

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Gerald D. Hestle,

Petitioner,

v.

Case No. 05-40245
Criminal Case No. 02-50030-1

Sean F. Cox
United States District Judge

United States of America,

Respondent.

Michael Hluchaniuk
United States Magistrate Judge

ORDER

**ACCEPTING AND ADOPTING REPORT & RECOMMENDATION AND DENYING
PETITIONER HESTLE'S OBJECTIONS**

Petitioner Gerald Devaughn Hestle, (“Hestle”), filed a Motion to Vacate the Sentence regarding his conviction for possession with intent to distribute 50 grams or more of cocaine base on August 1, 2005. (Docket No. 74.) Petitioner’s Motion to Vacate the Sentence was referred to Magistrate Judge Hluchaniuk on August 4, 2011. (Docket No. 122.) Magistrate Judge Hluchaniuk issued his Report and Recommendation, (“the R&R”), on April 23, 2012, recommending that this Court **DENY** Petitioner’s Motion to Vacate the Sentence. Thereafter, Petitioner filed his Objections to the Magistrate Judge Hluchaniuk’s R&R on May 7, 2012. (Docket No. 131.)

The Court finds that the issues have been adequately presented in the parties’ briefs and that oral argument would not significantly aid the decision making process. *See* Local Rule 7.1(f)(2), U.S. District Court, Eastern District of Michigan. The Court therefore orders that the motion will be decided on the briefs. For the reasons that follow, Petitioner’s objections are **DENIED** and/or **REJECTED** and Magistrate Judge Hluchaniuk’s R&R is **ADOPTED**. Accordingly, Petitioner’s

Motion to Vacate the Sentence is **DENIED**.

Hestle was found guilty in a jury trial on August 16, 2002, of possession with intent to distribute 50 grams or more of cocaine base. (Docket No. 130, at 1.) He was sentenced to a mandatory life sentence on December 12, 2002, based on the amount of drugs involved and his two prior convictions for felony drug offenses. (*Id.*)

Hestle thereafter appealed to the Court of Appeals, and the Court affirmed his conviction in an opinion issued on August 11, 2004. (*Id.*) One of the issues raised on appeal was a claim that the trial prosecutor had improperly exercised peremptory challenges as to two African-American jurors and had violated the principles contained in *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986). (*Id.* at 2.) With regard to that issue, the Court of Appeals held that, although Hestle established a *prima facie* case for race discrimination, the prosecutor came forward with race neutral reasons for striking the two-African-American jurors that the trial judge found credible and there was no evidence suggesting that the strikes were racially discriminatory or motivated. (Docket No. 130, at 2; Docket No. 65.)

Petitioner then filed his Motion to Vacate the Sentence pursuant to 28 U.S.C. § 2255 on August 1, 2005, alleging ineffective assistance of counsel in several areas of conduct by trial counsel, which was denied upon the District Court adopting the May 30, 2007, Report and Recommendation issued by Magistrate Judge Steven D. Pepe, which essentially recommended that the District Court deny the motion because it was an attempt to re-litigate Petitioner's *Batson* claim. (Docket No. 74.) Petitioner appealed from the District Court's Order and Judgment adopting the Report and Recommendation, and the Court of Appeals remanded this action to this Court on June 2, 2011, upon holding that the merits of the *Batson* claim is "analytically distinct" from the

ineffective assistance of counsel claim raised in the § 2255 petition. (Docket No. 130, at 4; Docket No. 117.) This Court referred the Motion to Vacate the Sentence to Magistrate Judge Michael J. Hluchaniuk on August 4, 2011. (Docket No. 122.) After reviewing the evidence presented and the parties' briefs and conducting a motion hearing on January 5, 2012, Magistrate Judge Hluchaniuk issued his R&R on April 23, 2012, recommending that Hestle's Motion to Vacate the Sentence be **DENIED**. (Docket No. 130, at 5–6, 32.)

Petitioner filed his objections to the R&R on May 7, 2012. (Docket No. 131.) In the R&R, Petitioner objects that (1) he has shown deficient performance by trial counsel and that prejudice should have been presumed pursuant to *Johnson v. Sherry*, 586 F.3d 439, 445–47 (6th Cir. 2009); (2) even if prejudice is not presumed under *Johnson*, he has shown that there is a reasonable probability that, but for the trial counsel's deficient performance, he would not have been convicted; and (3) Magistrate Judge Hluchaniuk's recommendation in his R&R is erroneous and should not be adopted. (Docket No. 131.)

After reviewing the record and transcripts of the January 5, 2012, motion hearing, this Court is satisfied with Magistrate Judge Hluchaniuk's recommendation that this Court **DENY** Hestle's Motion to Vacate the Sentence. With regard to objections (1)–(3), Hestle is essentially asserting that the Magistrate Judge Hluchaniuk improperly applied the factors for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). This Court finds no reason nor does Hestle provide any sufficient argument or case law suggesting that the Magistrate Judge Hluchaniuk's recommendation is erroneous and should not be adopted.

The Court hereby **ADOPTS** the April 23, 2012, R&R. **IT IS ORDERED** that Hestle's Objections filed on May 7, 2012, are **DENIED** and/or **REJECTED**. Accordingly, Hestle's Motion

to Vacate the Sentence is **DENIED**.

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: October 17, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 17, 2012, by electronic and/or ordinary mail.

S/Jennifer Hernandez McCoy

Case Manager